UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF TEXAS
HOUSTON DIVISION

In re ENRON CORPORATION SECURITIES LITIGATION	§	Civil Action No. H-01-3624 (Consolidated)
	§	
	§	CLASS ACTION
This Document Relates To	§	
	§	
MARK NEWBY, et al., Individually and On Behalf of All Others Similarly Situated, Plaintiffs,	§	
	§	
vs.	§	
	§	
ENRON CORPORATION., *et al.* Defendants.	§	
	§	
THE REGENTS OF THE UNIVERSITY OF CALIFORNIA, et al., Individually and On Behalf of All Others Similarly Situated, Plaintiffs,	§	
	§	
vs.	§	
	§	
KENNETH L. LAY, *et al.* Defendants.	§	

DOW JONES & CO., INC., THE NEW YORK TIMES CO., THE WASHINGTON POST, USA TODAY, THE HOUSTON CHRONICLE, ABC AND THE REPORTERS' COMMITTEE FOR FREEDOM OF THE PRESS' BRIEF IN SUPPORT OF MOTION TO INTERVENE AND ON PROTECTIVE ORDER AND ACCESS ISSUES

1110

TABLE OF CONTENTS

TABLE OF AUTHORITIES

CASES

UNITED STATES CONSTITUTION

RULES

STATUTES

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF TEXAS
HOUSTON DIVISION

In re ENRON CORPORATION SECURITIES LITIGATION	§	Civil Action No. H-01-3624 (Consolidated)
	§	CLASS ACTION
This Document Relates To	§	
MARK NEWBY, et al., Individually and On Behalf of All Others Similarly Situated, Plaintiffs,	§	
vs.	§	
ENRON CORPORATION., *et al.* Defendants.	§	
THE REGENTS OF THE UNIVERSITY OF CALIFORNIA, et al., Individually and On Behalf of All Others Similarly Situated, Plaintiffs,	§	
vs.	§	
KENNETH L. LAY, *et al.* Defendants.	§	

DOW JONES & CO., INC., THE NEW YORK TIMES CO., THE WASHINGTON POST, USA TODAY, THE HOUSTON CHRONICLE, ABC AND THE REPORTERS' COMMITTEE FOR FREEDOM OF THE PRESS' BRIEF IN SUPPORT OF MOTION TO INTERVENE AND ON PROTECTIVE ORDER AND ACCESS ISSUES

TO THE HONORABLE MELINDA HARMON, UNITED STATES DISTRICT JUDGE:

Dow Jones & Company, Inc., the New York Times Company, the *Washington Post, USA Today*, the *Houston Chronicle,* ABC, Inc., and The Reporters' Committee for Freedom of the Press (collectively "Media Intervenors") file this brief in support of their Motion to Intervene for the limited purpose of being heard on Plaintiff's Motion to Preclude the Filing or Production of

Documents Subject to a Protective Order and on Defendants' proposed protective orders, and to share with the Court their views on how the Court should rule on these motions.

In summary, the Media Intervenors' position is that no protective order should be entered regarding any of the Enron documents that this Court has ordered be placed into the document depository because:

(1) the extraordinary public interest in the Enron matter and these documents makes this case different and justifies public access;

(2) confidentiality was waived when Enron produced these documents to multiple government agencies; and

(3) the factors that govern the Court's exercise of discretion in deciding whether to enter a protective order justify full disclosure.

In addition, the Media Intervenors urge the Court to defer ruling, at this stage, on the question of confidentiality as to discovery that has been stayed, but if the Court enters any protective order, the Media Intervenors contend that the terms should:

(1) impose a strong presumption of non-confidentiality and public access;

(2) impose the burden of proving confidentiality on Enron (or other producing parties), and it should be a high burden;

(3) require specific, individualized proof that confidentiality of particular documents has been maintained by the producing party and must be maintained by the Court to protect ongoing business;

(4) require an individualized determination by the Court as to the confidentiality of documents, not categorical determination of broad descriptions of types of documents; and

(5) provide for a process that operates in a timely fashion to resolve confidentiality disputes, in as open a forum as possible.

I. The Media Intervenors

Dow Jones & Company, Inc., publishes, *inter alia*, *The Wall Street Journal*, a national newspaper published each business day; the Dow Jones Newswires, real-time, 24-hour newswires distributed electronically to subscribers; *Barron's*, a weekly newspaper of business and finance; WSJ.com, the largest subscription news site on the world wide web with more than 650,000 subscribers; and, through its Ottaway Newspaper, Inc. subsidiary, 13 daily and 13 weekly newspapers in 10 states.

The New York Times Company publishes *The New York Times*, a national newspaper distributed throughout New York State and throughout the world. Its weekday circulation is the third highest at approximately 1.1 million, and its Sunday circulation is the largest at approximately 1.7 million. The New York Times Company has no affiliates or subsidiaries that are publicly owned.

The Washington Post is a daily newspaper published by The Washington Post Company in Washington, D.C., with a daily circulation of over 740,000 and a Sunday circulation of over a million. The *Post* covers local, national, and international news.

USA Today is the nation's largest-selling daily newspaper, with a circulation of approximately 2.3 million. Its website, USAToday.com, is one of the top newspaper sites on the Internet.

The Houston Chronicle is Houston's daily newspaper, published for more than a century, in the city where Enron has its corporate offices and where this litigation is pending. It is the largest daily newspaper in Houston and one of the 10 largest in the country.

ABC, Inc. is a broad-based communications company with significant holdings in the United States and abroad. Alone or through its subsidiaries, it owns ABC News, the ABC Radio

Network, 52 radio stations and 10 television stations that regularly gather and report news to the public. ABC News produces the television programs "World News Tonight with Peter Jennings," "20/20," "Prime Time Live," and "Nightline," among others.

The Reporters' Committee for Freedom of the Press is a voluntary, unincorporated association of reporters and editors that works to defend the First Amendment rights and freedom of information interests of the news media. The Reporters Committee has provided representation, guidance and research in First Amendment and Freedom of Information Act litigation since 1970.

The Media Intervenors have intervened for the limited purpose of being heard on Plaintiff's Motion to Preclude the Filing or Production of Documents Subject to a Protective Order, Defendants' opposition to that motion, and the Defendants' proposed protective orders.

II. Preliminary Statement

Few economic events in recent years have had such an immediate and devastating effect as Enron's dramatic announcement in October 2001 that it had overstated its earnings by billions of dollars. This unprecedented admission was a crushing blow to millions of Americans, thousands of Enron workers and pensioners, and the American economy at large. A company that had boasted of over $100 billion in revenue in 2000 filed bankruptcy in 2001.

The Enron debacle has now been blamed, in part, on the fact that company executives and others created partnerships that were used to artificially inflate Enron's earnings by moving debts off its publicly-reported financial statements. These and additional allegations of wrongdoing – some now admitted – distinguish this case as unique.

With Enron's collapse, several legislative committees and several executive branch agencies initiated investigations into the company's operations and the decisions of its executives

and directors: taking testimony, reviewing documents, and holding hearings to learn what had happened, why it had happened, who was responsible, and how such a debacle might be avoided in the future. But perhaps the most important function of these investigations has been to try to restore the public's confidence in the legal and accounting regimes under which publicly-held companies operate; systems that were supposed to prevent the kinds of financial legerdemain that led to Enron's downfall. These probes have moved forward with the benefit of documents, testimony, and other materials that Enron produced.

The Media Intervenors have played an important role in chronicling the Enron story: the company's implosion in the fall of 2001, the resulting financial fallout, the crushing effect on investor trust in the stock market, and the various government investigations into the mess.

The discovery in this lawsuit promises to supply more answers to the many questions being asked by the government, the investing community, and everyday citizens. While in some instances government bodies have announced findings and conclusions, the public has not yet had the benefit of seeing all of the information relied upon by government investigators, nor had an opportunity to independently analyze those matters.

This Court, recognizing that the documents and testimony that Enron has already produced in response to those government investigations should be available to the Plaintiffs, has ordered those materials (save attorney-client communications and work product) into a Court-ordered document depository. *See* February 27, 2002, Scheduling Order (Docket No. 326), and August 15, 2002, Order regarding production (Docket No. 1008). The Plaintiffs propose to take those materials and post them on an Internet web site to allow direct public access. Enron opposes this, and argues for exactly the opposite: that the public be denied <u>any</u> access to those materials, and that only after a particularized review by this Court could <u>any</u> items be made

publicly available. The other Defendants suggest a middle ground, but still one that would grant wide latitude to the Defendants to label items "confidential" and keep them from public scrutiny.

The Media Intervenors urge the Court to adopt the Plaintiffs' proposal regarding the Enron documents already produced to government agencies, and defer ruling on a protective order regarding other discovery until the stay dictated by the Private Securities Litigation Regulatory Act is lifted.

III. Statement of the Case

This shareholder lawsuit was brought in October 2001; Enron filed for bankruptcy in early December 2001; other cases involving Enron issues were consolidated with this case in December 2001. In February 2002 this Court entered a scheduling order that set up a process for creating a document depository and protocols for access and copying from that depository. The order further provided for very limited discovery, requiring Enron to produce only:

(1) a copy of all documents and materials Enron has produced since filing for bankruptcy in connection with any inquiry(ies) or investigation(s) into the Company's handling of its ERISA-governed pension plans, that were provided, or that may be provided, pursuant to subpoena

  (a) by any committee of the Legislative branch of the United States Government, or

  (b) by the Executive branch of the United States Government, including, but not limited to, the Department of Labor, and

(2) copies of all transcripts of witness interviews or depositions in Enron's possession, custody or control, given or taken in connection with said inquiry(ies) or investigation(s).

These materials were to be placed in the document depository by April 1, 2002. The Court entered no protective order, but it did recognize that the production would be subject to attorney-client privilege or work product protection. *See* February 27, 2002 Scheduling Order at 3. On April 9, 2002, the Court signed an Agreed Order extending Enron's production deadline to April

8, 2002 and providing for limited confidentiality of the documents until such time that a more comprehensive order could be entered.

Beginning May 8, 2002, several Defendants filed motions to dismiss, which under the Private Securities Litigation Regulatory Act (PSLRA) had the effect of staying all discovery and other proceedings during the pendency of the motions. 15 U.S.C. § 78u-4(b)(3)(B). These motions remain pending.

On August 15, 2002, the Court lifted the PSLRA discovery stay for the limited purpose of requiring Enron to produce "all documents and materials produced by the Debtor related to any inquiry or investigation by any legislative branch committee, the executive branch, including the Department of Justice and the Securities and Exchange Commission, and all transcripts or depositions related to those inquiries." The Court observed that the burden of discovery.

> would be slight because Enron has already found, reviewed, and organized the documents. ... In a sense this discovery has already been made, and it is merely a question of keeping it from a party because of the structures of a statute designed to prevent discovery abuse.

August 15 Order at 3.

The Court has not yet entered a comprehensive order on the document depository. The Plaintiffs have filed a motion seeking such an order, and on October 7, 2002, the Court gave the parties five days to file any oppositions to the entry of the depository order.

IV. The Basis for Intervention

The media have a right of access to judicial records and have standing to assert and protect that right in court. *Ford v. City of Huntsville*, 242 F.3d 235, 240 (5th Cir. 2001). *See also Davis v. East Baton Rouge Parish School Board*, 78 F.3d 920 (5th Cir. 1996) (news agencies have standing to challenge a court's confidentiality order that prohibits disclosure of draft desegregation plans) (citing cases).

The Media Intervenors seek to intervene for a limited purpose – to protect this right and to assist the Court in its determination of whether any protective order should be entered at this stage and, if so, what kind. The Fifth Circuit has repeatedly affirmed media intervention for similar purposes, even reversing a district court's denial of a newspaper's motion to intervene in *Ford v. City of Huntsville*, 242 F.3d at 241.

The Media Intervenors meet the requirements for intervention set out in Federal Rule of Civil Procedure 24(a)(2). *See also Doe v. Glickman*, 256 F.3d 371, 375 (5th Cir. 2001) (discussing Rule 24's requirements). Their interest, which has been timely asserted, may be impaired by a protective order. This interest is potentially different and broader than the Plaintiffs' interest and, therefore, may not be adequately represented by the Plaintiffs. For these reasons, the Media Intervenors should be permitted to intervene for the limited purpose of protecting their interest.

Alternatively, the Media Intervenors should be permitted to intervene under Rule 24(b), because their claim and the claim of the parties involve a common question of law. The Media Intervenors have timely moved for intervention, and their limited intervention will not unduly delay the case or prejudice the parties.

V. Why This Case is Different

Aside from the obvious enormous public interest, timing and technology make this case unique.

Timing. The Plaintiffs' motion to preclude filing or production of documents under seal comes before the Court has entered any comprehensive order providing for confidentiality, and concerns documents already ordered produced. In contrast with those circumstances where access is sought to production made by a party after a protective order is in place and in reliance

on that protective order, *see, e.g., Securities and Exchange Commission v. TheStreet.com*, 273 F.3d 222, 229 (2d Cir. 2001); *Martindell v. International Telephone and Telegraph Corp.*, 594 F.2d 291, 296 (2d Cir. 1979), in this case documents were ordered produced to the Plaintiffs without any protective order addressing confidentiality. Only after the Court issued its first production order did the question of confidentiality arisen, and that issue remains unresolved.

Timing is also important because, by definition, the documents Enron has been ordered to produce in this case have already been produced at least once.[1] There is no need for a protective order to encourage Enron's production of the same documents here.

Technology. Because the Court has ordered the creation of an electronic document depository that the Plaintiffs propose to duplicate in a publicly-available web site, technology makes this case unique as well. In essence, just as the Court, through its PACER system, makes available to the public the pleadings filed in this action (and just as discovery documents used to be filed in Court and made publicly accessible until the administrative burden became too great), the Plaintiffs propose to make these records that Enron previously produced to the Congress, state agencies, and law enforcement officials available as well.

The Plaintiffs' motion comes at the time when the Court is asked to exercise its discretion. Unlike other situations where courts are asked to deny access to "the raw fruits of discovery," these Enron documents are different. They have been identified and examined by government agencies as documents relevant to government inquiries and interests. In the hands

[1] Enron has made productions to several government agencies. It has apparently made a similar production to Dynergy in the litigation between those parties. In its papers urging the Court to order Enron's production, Plaintiffs attached a copy of a Dynergy pleading reciting, in June 2002, that "Enron has represented that it expects to produce an enormous number of additional documents soon–including ... some eleven hundred boxes of documents produced to the government in the course of numerous investigations of Enron's collapse ... ." Reply Memorandum in Support of the Regents of the University of California's Motion for a Limited Production of Enron Documents (Docket No. 947), filed June 25, 2002, quoting from Exhibit A, *Enron v. Dynergy*, No. 02-1528, Defendants' Submission of Proposed Scheduling Order for Consideration at June 13 Hearing and Memorandum in Support (Docket no. 60) at 2-3 (S.D. Texas June 10, 2002).

of the various federal and state government agencies, the documents are subject to freedom of information requests. The production to the Plaintiffs arises, at least in part, because these documents have already been seen by the government. They are more than the "raw fruits of discovery"; they are the ingredients the government selected to develop its understanding of Enron and its conduct. That makes these documents independently valuable and of public interest in addition to the value they may have for the Plaintiffs. The Media Intervenors urge the Court to exercise its discretion in a manner providing for the maximum public exposure of Enron's own information about the Enron fiasco.

VI. Factors that Should Inform the Court's Exercise of its Discretion

The Federal Rules of Civil Procedure operate under the presumption that when parties exchange discovery, they are free to share that information with others. *See Harris v. Amoco Production Co.*, 768 F.2d 669, 683-84 (5th Cir. 1985) ("A party may generally do what it wants with material obtained through the discovery process, as long as it wants to do something legal."); *In re Halkin*, 58 F.2d 176, 188 (D.C. Cir. 1979) ("The implication is clear that without a protective order materials obtained in discovery may be used by a party for any purpose, including dissemination to the public.").

Rule 26(c) requires the party seeking to exclude others from pretrial discovery to obtain a judicial order authorizing such exclusion. *See New York v. Microsoft Corporation*, 206 F.R.D. 19 (D.D.C. 2002); Fed. R. Civ. P. 26(c)(5). Such orders should be issued only on good cause, and "the burden is upon the movant to show the necessity of its issuance, which contemplates a particular and specific demonstration of fact as distinguished from stereotyped and conclusory statements." *In re Terra International, Inc.*, 134 F.3d 302, 306 (5th Cir. 1998), *citing United States v. Garrett*, 571 F.2d 1323, 1326 n.5 (5th Cir. 1978).

Determining "good cause" "requires the district court to balance the party's interest in obtaining access against the other party's interest in keeping the information confidential." *Chicago Tribune Company v. Bridgestone/Firestone, Inc.*, 263 F.3d 1304, 1306 (11th Cir. 2001). *See also Farnsworth v. Proctor & Gamble Co.*, 758 F.2d 1545, 1547 (11th Cir. 1985) (Rule 26(c) requires a balancing of interests); *Pansy v. Borough of Stroudsburg*, 23 F.3d 772, 787-88 (3d Cir. 1994) (balancing process used in judging good cause, including "whether the case involves issues important to the public"). Failure to take all appropriate interests into account can be an abuse of discretion. *See, e.g., Davis v. East Baton Rouge Parish School Board*, 78 F.3d 920, 930-31 (5th Cir. 1996) (failure to consider state law in granting protective order abuse of discretion); *Ford v. City of Huntsville*, 242 F.3d 235, 241-42 (5th Cir. 2001) (same).

In weighing these interests, "[t]he judge is the primary representative of the public interest in the judicial process and is duty-bound therefore to review any request to seal the record (or part of it).... He may not rubber stamp a stipulation to seal the record." *Citizens First National Bank of Princeton v. Cincinnati Insurance Company*, 178 F.3d 943, 945 (7th Cir. 1999) (citations omitted).

In this case, several factors should inform the Court's exercise of its discretion, all of which support granting the broadest public access to the Enron documents at issue. These include: the basic principles of Rule 26(c) and the requirement of "good cause," the First Amendment and common law precedents that create a presumption of access to judicial records, the influence of state law expectations about access to discovery materials, the peculiar circumstances of the current state of the discovery here where Enron has been ordered to produce materials over which it has already lost control when it delivered these same documents into the hands of the government; the increasing disfavor of using umbrella protective orders; the speed

of production, and the public interest. Consideration of these factors should yield a confirmation of the Court's previous orders for production and dissipate any cloud of confidentiality that the April 9 Agreed Order may have created.

A. Media Intervenors' and Public's Interest in Receiving Speech and Information on Enron. The Plaintiffs have indicated a desire to tell the Media Intervenors about what the Court-ordered Enron production will show. The Media Intervenors have a corresponding First Amendment right to gather the news and receive speech that should not be denied absent the existence of an important governmental interest or countervailing right. For instance, in *Davis v. East Baton Rouge Parish School Board*, 78 F.3d 920, 928-29 (5th Cir. 1996), the Fifth Circuit held that the District Court had abused its discretion in entering a confidentiality order that barred disclosure to the public and news agencies the content of school board discussions regarding desegregation. The Court should carefully weigh the media and public's interest to receive Plaintiffs' information in crafting any protective order.

B. The First Amendment and Common Law Right of Access. In exercising its discretion and balancing the interest of the parties, First Amendment and common law access principles should also inform the Court's decision. While the First Amendment and the common law right of access to judicial records may not mandate disclosure, those principles deserve consideration. The United States Supreme Court has made it clear that judicial processes are a central matter of public concern and that the First Amendment grants a right of access to those matters that are traditionally open to the public. *See Richmond Newspapers, Inc. v. Virginia Newspapers*, 448 U.S. 555, 576-77 (1980). *Richmond Newspapers* involved access to a criminal trial that the state of Virginia had conducted in secret pursuant to a statute granting the judge discretion to do so. The Supreme Court found this secrecy improper, explaining that:

> [t]he explicit, guaranteed rights to speak and to publish concerning what takes place at trial would lose much meaning if access to observe the trial could, as it was here, be foreclosed arbitrarily.

Id. This right of access is a necessary tool in the hands of voters. In *Globe Newspapers Co. v. Supreme Court*, 457 U.S. 596 (1982), the Supreme Court explained that the First Amendment right of access is based upon:

> the common understanding that a 'major purpose of that Amendment was to protect the free discussion of governmental affairs.' By offering such protection, the First Amendment serves to ensure that the individual citizen can effectively participate in and contribute to our republican system of self-government.

457 U.S. at 604 (citation omitted). These cases and others by the Supreme Court, *see e.g., Press-Enterprise Co. v. Superior Court*, 464 U.S. 501 (1986), and *Press-Enterprise Co. v. Superior Court*, 478 U.S. 1 (1986), involved the right of access to criminal proceedings and other judicial processes, and some circuits have held that the First Amendment also protects the public's right of access to judicial records. *See e.g., Rushford v. New Yorker Magazine, Inc.*, 846 F.2d 249, 253 (4th Cir. 1988); *In re Continental Illinois Sec. Litig.*, 732 F.2d 1302, 1308 (7th Cir. 1984); *Brown & Williamson Tobacco Corp. v. FTC*, 710 F.2d 1165, 1177 (6th Cir. 1983, *cert. denied*, 465 U.S. 1100 (1984).[2]

But even before the Supreme Court recognized a constitutional right of access for some judicial processes, it had recognized a common law right of access to judicial papers and other matters on file with the Court. *Nixon v. Warner Communications, Inc.*, 435 U.S. 589, 597 (1978). This common law right of access to judicial records has been clearly established in the Fifth Circuit. *See, e.g., Securities and Exchange Commission v. Van Waeyenberghe*, 990 F.2d

[2] In *Belo Broadcasting Corporation v. Clark*, 654 F.2d 423, 426-27 (5th Cir. 1981), the Fifth Circuit denied the existence of any constitutional right of access to tape recordings admitted as exhibits, but that decision predates the development of the *Richmond Newspapers* decision in later Supreme Court cases. The Fifth Circuit has denied access to non-judicial records on two occasions: *American Civil Liberties Union v. State of Mississippi*, 911 F.2d 1066 (5th Cir. 1990) and *Calder v. Internal Revenue Service*, 890 F.2d 781 (5th Cir. 1989), but neither case directly addressed the First Amendment right of access to judicial records.

845 (5th Cir. 1993) (Recognizing common law right of access and cautioning that discretion to seal should be used "charily").

Because the right of access serves "as a check upon possible abuses by the court system, and help[s] to produce an informed and enlightened public opinion," the Second Circuit has stressed the fundamental importance of this right to our democracy. *United States v. Myers (In re Nat'l Broadcasting Co., Inc.)*, 635 F.2d 945, 950 (2d Cir. 1980). *See United States v. Amodeo*, 71 F.3d 1044, 1049 (2d Cir. 1995) ("*Amodeo II*") ("The presumption of access is based on the need for federal courts . . . to have a measure of accountability and for the public to have confidence in the administration of justice."); *Securities and Exchange Commission v. TheStreet.com*, 273 F.3d 222, 231-32 (2d Cir. 2001).[3]

There are cases that have suggested that pretrial discovery, which is typically undertaken privately and may or may not be filed with the court, does not have the same presumption of

---

[3] Some Defendants have suggested that the change in Rule 5 to discontinue the filing of discovery was a substantive indication that no access should be allowed, but in fact the Rule 5 change was administrative only. Until December 2000, Federal Rule of Civil Procedure 5(d) read:

> All papers after the complaint required to be served upon a party, together with a certificate of service, shall be filed with the court within a reasonable time after service, but the court may on motion of a party or on its own initiative order that depositions upon oral examination and interrogatories, requests for documents, requests for admission, and answers and responses thereto not be filed unless on order of the court or for use in the proceeding.

As amended, the rule now states that parties may not file discovery documents until the documents are used in a proceeding or unless the court orders filing. This change should not affect access to these documents.

The Second Circuit, in *In re Agent Orange*, considered the policy behind the old Rule 5(d) when it affirmed a district court's decision to unseal discovery materials. *In re Agent Orange Prod. Liab. Litig.*, 821 F.2d 139 (2d Cir. 1987). Later, the Second Circuit expressed some doubt about the continuing vitality of this policy by stating in a footnote that Rule 5(d) had been amended to provide "no presumption of filing all discovery materials, let alone public access to them." *Securities & Exchange Comm'n v. TheStreet.com*, 273 F.3d 222, 233 n.11 (2d Cir. 2001).

Rule 5's amendment should not disturb the conclusion or the reasoning of *In re Agent Orange*. As a practical matter, the rule has not changed; in *Agent Orange*, the Eastern District of New York, where the case was pending, had opted out of the old Rule 5(d) and had a local rule resembling the current 5(b). *Agent Orange*, 821 F.2d at 146. Despite this local rule, the conclusion was that documents should be available. Additionally the Advisory Committee Notes to the 2000 revision only reflect a concern with the cost of filing discovery materials; they do not suggest that the change was motivated by a desire to restrict access. Contrary to the Second Circuit's footnote in

access that arises with other judicial records. In *Seattle Times v. Rhinehart*, 467 U.S. 20 (1984) the U.S. Supreme Court did not require a higher standard for evaluating protective orders related to pretrial discovery, but ultimately decided that the good cause standard under Rule 26(c) provided sufficient protections for First Amendment interests. However, in evaluating the good cause to justify the protective orders in *Seattle Times v. Rhinehart*, the proof necessary to support those protective orders had to be sufficient to show good cause even in the face of the public interest in the mattes that were being disclosed. *Id.* at 38. As Justice Brennan notice, those First Amendment concerns remain important in judging "good cause:" "The Court today recognized that pretrial discovery orders, designed to limit the dissemination of information gained through the civil discovery process, are subject to scrutiny under the First Amendment." 467 U.S. 20, 37 (Brennan, J. concurring).

Some lower courts, particularly the Second Circuit, have taken the position that discovery materials are not "judicial documents" to which a presumption of access adheres, *see Securities and Exchange Commission v. TheStreet.com*, 273 F.3d 222, 231-232 (2d Cir. 2001); *United States v. Amodeo*, 44 F.3d 141, 145 (2d Cir. 1995). But as Judge Posner of the 7th Circuit observed that "[m]ost cases endorse a presumption of public access to discovery materials." *Citizens First National Bank of Princeton v. Cincinnati Insurance Company*, 178 F.3d 943, 946 (7th Cir. 1999), *citing Grove Fresh Distributors, Inc. v. Everfresh Juice Co.*, 24 F.3d 893, 897 (7th Cir. 1994); *Beckman Industries, Inc. v. International Ins. Co.*, 966 F.2d 470, 475-76 (9th Cir. 1992); *Public Citizen v. Liggett Group, Inc.*, 858 F.2d 775, 788-90 (1st Cir. 1988); *Meyer Goldberg, Inc. v. Fisher Foods, Inc.*, 823 F.2d 159, 162-64 (6th Cir. 1987). Given that the issue

---

TheStreet.com, the Rule 5 amendment does not alter presumptions about public access, particularly because the court may still order discovery materials to be filed.

of whether pretrial discovery is considered a "judicial record" is still an open issue in the Fifth Circuit, the Court should consider this factor in addressing the protective order question.

C. State Law Provisions Concerning Access. This case presents a curious hybrid regarding judicial documents. In the past, Federal Rule of Civil Procedure 5(d) required the filing of discovery products with the court. That rule was later amended to eliminate that requirement, but the concept of having discovery documents in the court records pursuant to court rule has certainly informed some court's decisions about granting relief from protective orders that may have previously protected that information. *See In re "Agent Orange" Product Liability Litigation*, 821 F.2d 139, 145-46 (2d Cir. 1987); *Westchester Radiological Association v. Blue Cross/Blue Shield of Greater New York, Inc.*, 138 F.R.D. 33, 35-36 (S.D.N.Y. 1991).

Here the Court has ordered the creation of a mechanism for the deposit of discovery materials in a depository available to the parties. While the depository may be in a warehouse that is not under the Court's direct supervision, the fact that the Court has authorized the creation of such a depository invokes the same principles that have suggested to other courts that access should be allowed to documents that are matters of public concern and under the control of the Court. *See In re "Agent Orange" Product Liability Litigation*, 821 F.2d at 143, 145-147.

The Fifth Circuit has recognized that in issuing protective orders district courts must consider state law approaches to similar material. For example, in *Ford v. City of Huntsville*, 242 F.3d 235 (5th Cir. 2001), the Fifth Circuit held that a district court considering a confidentiality order covering a settlement with a public entity should consider the Texas Public Information Act, which provided that settlements with government entities are presumptively open to the public. Given that state standard, the Court found that the district court had abused

its discretion by not taking into account the order's effect on state law before ordering the settlement to be kept confidential. 242 F.3d at 241-242.

Similarly, this Court finds itself in a unique situation because it is located in a state that recognizes that certain types of discovery materials are "court records" that should be open to the public even if they are held in the hands of private parties. *See* Tex. R. Civ. P. 76a (providing that unfiled discovery on matters involving general public health and safety, administration of public office, or operation of government are "court records" subject to rules regarding the seeking of court records). Under Rule 76a, "court records" are presumed open, and the rule requires that the court must hold a hearing before any such records may be sealed. The party seeking a sealing order must prove:

> (a) a specific, serious and substantial interest which clearly outweighs:
>
> (1) this presumption of openness;
>
> (2) any probable adverse effect that sealing will have upon the general public health or safety;
>
> (b) no less restrictive means than sealing records will adequately and effectively protect the specific interest asserted.

Tex. R. Civ. P. 76a. While the Texas procedural rules are not specifically binding, the Fifth Circuit has ruled that district courts should be sensitive to state law provisions that promote openness before entering confidentiality orders. *See Davis v. East Baton Rouge Parish School Board*, 78 F.3d 920, 930 (5th Cir. 1996); *Ford v. City of Huntsville*, 242 F.2d 235, 241-42 (5th Cir. 2001). This Court should continue that practice here.

D. The Impact of Enron's Production to the Government on Any Claim of Confidentiality. The materials that the Court has ordered Enron to produce and place into the document depository were provided to several congressional committees, the Department of

Justice, the Securities and Exchange Commission, and the Federal Energy Regulatory Commission. Affidavit of Robert Williams in Support of Enron's Opposition to Plaintiff's Motion to Preclude the Issuance of a Protective Order, ¶ 2, 5 (hereafter "Williams Aff."). Enron makes broad and conclusory statements that these documents were produced without a "specific document-by-document review" and that—only with regard to documents produced to the FERC[4]—that they were produced "pursuant to regulations that presumes the confidentiality of the documents absent a challenge from the agency or a third party that the documents are not entitled to such protection." *See* Williams Aff. ¶¶ 7, 8.

The Williams Affidavit, when read carefully, actually confirms that, with few exceptions, Enron produced all of the requested documents with no confidentiality obligation in place. The documents were produced to, for instance, the Senate Governmental Affairs Committee. Williams Aff. at ¶ 5. Enron produced these documents without seeking or obtaining a protective order restricting their use or disclosure. Enron cites no law or regulation that obliges the Senate Governmental Affairs Committee to keep those documents confidential. Indeed, such a production would necessarily waive any claim of confidential or proprietary information because the role of a congressional committee, at least in part, is to take public testimony, engage in public fact-gathering, and develop public policy to respond to a public need. Enron could not put materials in the hands of the government (no less than a congressional committee) and expect to retain the confidential and proprietary nature of any of those materials. That must be true in the particular circumstances in which Enron and its management and directors have placed themselves over the last fourteen months.

Moreover, by disclosing these documents to the government, Enron made the information

[4] It is not clear if Enron produced to FERC documents that it believed were kept confidential pursuant to FERC regulations that it did not produce to the other government agencies. If Enron produced the same documents to

subject to disclosure from the government under applicable freedom of information laws. "Where it is likely that information is accessible under a relevant freedom of information law, a strong presumption exists against granting or maintaining an order of confidentiality whose scope would prevent disclosure of that information pursuant to the relevant freedom of information law." *Ford v. City of Huntsville*, 242 F.3d 235, 241 (5th Cir. 2001) (quoting *Pansy v. Borough of Stroudsburg*, 23 F.3d 772, 791 (3d Cir. 1994)).

E. The Increasing Disfavor of Umbrella Protective Orders. Enron argues that "Courts Routinely Use Umbrella Protective Orders in Complex Litigation" and cites several old cases. Enron Opposition at 10-11. But, more recently, federal courts have turned away from protective orders that make everything confidential. In *Citizens First National Bank of Princeton v. Cincinnati Insurance Company*, 178 F.3d 943 (7th Cir. 1999), the Court recognized that the weight of authority was against such orders, and that even courts that had originally endorsed such orders had moved away from such an approach, including courts that decided some of the cases upon which Enron relies. 178 F.3d at 946 ("And we note that both the First and Third Circuits, which once used to endorse broad umbrella orders (e.g. *Cryovac, Cipollone*), have moved away from that position (*Public Citizens, Glenmede, Pansy, Leucadia*))." Numerous courts require the district court to make a determination of good cause before entry of a protective order on specific documents or materials, as is the practice called for under Rule 26(c). *See, e.g., In re Terra International*, 134 F.3d 302, 306 (5th Cir. 1998) (requiring particular and specific demonstrations of fact). *See also EEOC v. National Children's Center, Inc.*, 98 F.3d 1406, 1411 (D.C. Cir. 1996); *Glenmede Trust Co. v. Thompson*, 56 F.3d 476, 484-85 (3d Cir. 1995); *Leucadia, Inc. v. Applied Extrusion Technologies, Inc.*, 998 F.2d 157, 165-67 (3d Cir. 1993); *In re Remington Arms Co.*, 952 F.2d 1029, 1032 (8th Cir. 1991); *City of Hartford v.*

---

other agencies without the protective FERC regulations, it cannot look to FERC to shield the document from view.

Chase, 942 F.2d 130, 135-37 (2d Cir. 1991); *Farnsworth v. Proctor &Gamble Co.*, 758 F.2d 1545, 1547 (11th Cir. 1985).

Even Enron's Co-Defendants did not suggest that all discovery be presumed confidential. They propose a more conventional confidentiality order that requires the producing party to claim confidentiality on a document—a claim that can then be challenged by the receiving party. But even that standard invites abuse unless the grounds for designation are narrowly stated. *Citizens First National Bank*, 178 F.3d at 946.

The Fifth Circuit standard for establishing good cause "contemplates a particular and specific demonstration of fact as distinguished from stereotyped and conclusory statements." *In re Terra International*, 134 F.3d 302, 306 (5th Cir. 1998). The umbrella protective order Enron seeks is inconsistent with that standard.

F. The Speed of Production. Under the court's current orders, the only review that Enron needs to make of these documents is for attorney-client or work product privilege. Enron has done this anyway before production to the Plaintiff; indeed, nearly eight months have passed since this Court's first order requiring Enron essentially to review and catalog these documents (all of which had been previously produced and likely reviewed at the time). There should be no delay in Enron's production if the Plaintiffs' approach is followed.

In contrast, Enron's approach would involve the Plaintiffs, or other receiving parties, deciding that they want to take time to identify documents they would ask the Court to review, wait forty-five days, then engage with the Court on whether they should be available to the public. The Plaintiff's approach, at least as to these Enron documents, speeds production and access and relieves the Court from pressure to review documents for confidentiality. That serves the Court's interest in continuing momentum toward trial.

G. The Public Interest in Enron's Conduct. Clearly the information about Enron and its practices is of tremendous public importance. The Enron debacle has undermined the confidence in pubic companies, the stock market (including government regulation and oversight of the markets), and the accounting industry, as well as making millions of Americans fearful for their retirement. The Enron situation raises questions about the role of government while Enron's allegedly wrongful conduct was on-going, what role public officials might have played in facilitating the practices now under attack, and how the government will respond to the situation. Finally, and equally importantly, this case raises the question of how the Court system will respond to this situation so as to render justice and to assure the public that justice is being done in this and other judicial forums.

1. The General Impact of Enron's Demise on Public Confidence and Well-Being. The Media Intervenors have assembled a series of stories illustrative of some of the reporting on the impact of the Enron crisis. *See* Exhibit B, attached. Those stories makes it clear that the Enron matter has reached deep into the care of the American system. For example:

> ***The Wall Street Journal*, November 29, 2001:**
>
> The sudden, deep financial troubles of Enron Corp., the once aggressive, many-tentacled energy conglomerate, could have widespread consequences for scores of companies across the economy. * * * The scale of the Enron collapse is huge, experts say. "There is nothing to compare it to," said Edward Tillinghart, a bankruptcy specialist with Coudert Brothers in New York. "The business was so large. There were so many kinds of different operating entities under the Enron umbrella."
>
> ***The Wall Street Journal*, December 19, 2001:**
>
> Many Enron Corp. employees will suffer even greater losses to their retirement income than was immediately apparent in the wake of the energy-trading company's sudden downfall.
>
> ***New York Times*, January 20, 2002:**

The system of safeguards that was put in place over the years to protect investors and employees from a catastrophic corporate implosion largely failed to detect or address the problems that felled the Enron Corporation, say regulators, investors, business executives and scholars.

The breakdown in checks and balances encompassed the company's auditors, lawyers and directors, they say. But it extended to groups monitoring Enron from the outside, like regulators, financial analysts, credit-rating agencies, the media and Congress, which in the coming week will open a blizzard of hearings into the company's downfall.

***New York Times*, May 16, 2002:**

Accused of accounting chicanery and illegally inflating power prices, companies that generate much of the nation's electricity have lost the confidence of investors. For the moment, they are finding it nearly impossible to raise money for new plants, raising the risk of future power shortages, industry experts say.

***USA Today*, November 30, 2001:**

Just 9 months ago, Enron's stock traded above $80 share. Its $62 billion in assets put it seventh on the Fortune 500 list. The company bought and sold wholesale energy and controlled roughly a quarter of the market. Now, almost overnight, it has all but evaporated, with its stock closing Thursday at a mere 36 cents a share. Enron is likely to go down as history's biggest bankruptcy.

More worrisome, however, is the fact that Enron's demise was a near-total surprise.

***Washington Post*, July 28, 2002:**

Enron was the first of recent business scandals that have devastated investor faith, contributed to a multi-trillion dollar market downturn and made corporate reform a political imperative. * * * The company's story provides a powerful parable. Policymakers, investors and executives must grapple with its lessons today; business students and historians will study them for decades.

***Houston Chronicle*, June 26, 2002:**

Criminal investigators examining the Enron debacle have expanded their inquiry to focus on activities at the commercial banks that provided billions of dollars in loans and other financial services to the company, according to current and former Enron executives and others involved in the investigation.

Federal prosecutors are investigating whether individual bankers illegally benefited from deals involving Enron-related entities, potentially at the expense of their employers, people involved in the case said.

***Houston Chronicle*, February 22, 2002:**

The congressional firestorm surrounding Enron Corp.'s collapse could mark a turning point that signals increasing political consequences from the surge of American families into the stock market. * * * Already the rising stake of ordinary Americans in the markets may be measured by the extraordinary interest in the Enron story.

The controversy may be attracting so much attention because many more Americans than a generation ago can imagine themselves in the shoes of the Enron employees, decimated after the company stock in their 401(k) plans cratered. In the recent Times survey, about half of adults said they have 401(k) plans and 71 percent of those said they are closely following the Enron story.

***Houston Chronicle*, February 3, 2002:**

Enron ripples continue to spread, engulfing current and former employees, investors, creditors, elected officials and even people who had never heard of Enron before the crash:

Wall Street is beginning to reflect investors' fears that accounting problems may be hiding other large companies' financial weaknesses. Financial pundits call the fears "Enronitis." * * * Power plant construction is on hold in many locations across the United States because Enron's failure has slowed the availability of money in the utility industry.

There are also very personal stories of tragedy:

***USA Today*, December 19, 2001:**

Charles Prestwood, an Enron retiree whose $1.3 million in savings vanished with the energy firm's collapse, described his experience this way: "it was rags to riches and back to rags." * * * Janice Farmer retired last year from Enron with nearly $700,000 worth of stock. When she tried to sell on Oct. 22, she was told she could not because Enron had just changed retirement plan administrators.

***Houston Chronicle*, August 18, 2002:**

They don't live in River Oaks. They don't drive Porsches. And they didn't leave Enron with millions in their pockets.

Nine months after being laid off when Enron filed for bankruptcy, a good portion of its former employees have been unable to find work.

Although acknowledging that the recession and slump in the energy industry are partly to blame, some former workers believe the real reason for their continued unemployment is the last place they worked.

"I'm suspicious that there is some stigma for people who have 'Enron' on their resume," said Roy Lipsett, former logistics manager for an industrial market group. "Everybody is painted with the same brush, like we're all crooked."

***Houston Chronicle*, August 4, 2002:**

His wife recently diagnosed with cancer and his former employer, Enron, on the ropes, Steve Pearlman decided days before Thanksgiving to cash in $280,000 worth of deferred-compensation claims to pay mounting health bills.

He filed a request, but the check never came.

Yet in the days before Enron went bankrupt, a few dozen company executives used a little-known clause in the deferred-compensation plan to retrieve at least $32 million.

The revelations of the effect of Enron's practices are still unfolding. In the last few months Enron's involvement in fraudulent schemes related to energy trading in California and other Western states has raised new questions:

***Houston Chronicle*, May 12, 2002:**

Enron's board of directors decided to make federal investigators' job a whole lot easier.

When they voted a week ago to hand over documents describing questionable trading practices used at the height of California's electricity crisis, they knew they would be re-igniting a firestorm.

If the documents are to be believed, Enron traders promised to provide California's grid operator backup power they didn't really have.

They created phony traffic on the grid to collect fees for relieving congestion that didn't exist. And they got paid for shipping electricity they didn't ship.

***USA Today*, May 13, 2002:**

Newly released Enron memos suggesting the company pushed California into an energy crisis will script gavel-pounding political theater when the Senate holds hearings on Wednesday. * * * California Democrats say the memos are compelling proof that Enron and other energy giants caused a state electricity meltdown in 2000 and 2001 that spiked prices tenfold and forced blackouts. Until now, Washington has focused on Enron's accounting practices.

***The Wall Street Journal*, October 21, 2002:**

> Mr. Belden's plea signals a new direction in the Enron investigation, which has so far focused on the failed energy firm's alleged use of phony bookkeeping to hide debt and inflate reported profit. Prosecutors are building the new case against Enron in secret grand-jury proceedings in San Francisco, investigating alleged fraud by Enron and other power traders that let them reap windfall profits while costing customers in California, Washington and Oregon billions of dollars in higher rates. Mr. Belden's testimony is expected to lead to criminal charges against other former executives at Enron, and some of its trading partners.
>
> * * *
>
> Early on, say former Enron employees, Mr. Belden, a vice president and its chief Western power trader, saw California's transmission bottlenecks as a weakness that could be exploited. Mr. Belden learned that by scheduling power deliveries over congested transmission lines, he could drive up the price. At the same time, he would have power to sell at the higher price on the other side of the bottleneck, reaping payments from the state authority by relieving the apparent congestion that he himself had created.
>
> * * *
>
> As Mr. Belden honed his skills and his team of traders focused on new ways to game the system in the months after the Silverpeak test in 1999, Enron trading revenues soared. Federal investigators say that revenue for his Western states' power-trading operation rose from $50 million that year to $800 million by 2001.

The materials that Enron produced to congressional and executive agencies that the Court has ordered produced to the Plaintiffs are central to these concerns.

2. Public Interest in Role of Public Institutions in the Enron Matter. In addition to understanding what Enron did and how it did it, the public also has an interest in understanding how its public institutions were involved in this situation as well as what they have done to explore ways to avoid a repeat. While many of the hearings by congressional committees have been the subject of news coverage, seeing what those committees had before them provides an opportunity to evaluate whether they asked the right questions, obtained the right materials, or came to the correct conclusions.

H. Public Interest in the Adjudication of Enron Cases. Finally, as this Court acknowledged in its February 27, 2002, order, there is a great deal of public interest in this lawsuit. The manner in which this lawsuit is conducted is of definite interest to the public. The manner in which this Court conducts this proceeding is important. The level of secrecy that Enron is proposing for documents it has already produced is not consistent with reassuring the public that there will be a careful and transparent examination of the issues raised by the Plaintiffs' consolidated complaint. This case really is different, and the Court should recognize this extensive public interest in deciding how it should handle confidentiality concerns.

VII. Enron's Arguments for a Protective Order Will Not Bear Scrutiny

Enron's arguments concerning protection from disclosing the documents that the Court has already ordered it to produce does not bear up under scrutiny. The issue is now joined: Enron must make the specific showing of good cause Rule 26(c) requires. Enron simply has not met its burden. None of Enron's arguments or affidavits overcome Plaintiffs' arguments that there is nothing in what Enron has already produced to the government that is so confidential that it would disrupt Enron's business.

Enron has already produced the large bulk of these documents without an effective protection from disclosure to competitors, partners, and the public at large. It has catalogued and can likely identify documents that may fit any narrow categories of protected items the Court might identify. Indeed, many of the documents likely disclose conduct and ways of doing business that have already been identified as criminal or have become obsolete in light of the collapse of Enron and many of the markets in which it purported to operate. Those documents, plainly are unlikely to contain any confidential or proprietary information of any continuing value. Finally, many of the transactions and events that may be described in the documents are

so old or are in markets that either no longer exist or have significantly changed such as to call into question any continuing value.

A. Enron Has Already Produced These Documents With No Assurance of Confidentiality. The first and most obvious flaw with Enron's argument is that the documents the Court has ordered it to produce have already been produced to the government with no assurance of confidentiality. Enron's supporting affidavit from Robert C. Williams, a managing director, describes numerous government investigations by the United States Congress, the Federal Energy Regulatory Commission (the "FERC"), the Commodities Futures Trading Commission (the "CFTC"), the Securities Exchange Commission (the "SEC"), the Department of Labor, and state agencies in California, Florida, and Connecticut. Williams Aff. at ¶ 2. Mr. Williams' description of Enron's response sounds like Enron opened up the filing cabinets and computer records and produced numerous documents without, he claims, a document-by-document review. Williams Aff. at ¶ 8. Other than a brief reference to a production to the FERC under regulations that preserve confidentiality unless someone challenges that production, *id.* at ¶ 7, there is no indication that Enron took any of the steps normally required to preserve the confidential nature of any claimed confidential and proprietary information.[5]

And Enron's production was to the United States government and some state governments whose intent, presumably, is to determine the facts concerning Enron's conduct,

[5] According to news reports in the *Houston Chronicle*, in May of 2002, Enron's Board of Directors voted to hand over documents describing questionable trading practices during California's energy crisis. These documents included memoranda addressed to an Enron lawyer that described the scheme for California power trading. The *Houston Chronicle* described two of the memos:

> Penned by in-house attorney Christian Yoder and outside counsel Stephen Hall, they detail strategies with colorful nicknames like "Fat Boy," "Death Star," and "Get Shorty," techniques in which traders would create phantom traffic on the state's overloaded power grid and rake in fees for relieving congestion they did not actually help alleviate.

Houston Chronicle, 5/12/02, Section A, p. 1 (attached as Exhibit B). These lawyers later appeared and testified before the Senate Commerce Committee's Consumer Affairs Subcommittee. Plainly Enron waived any confidentiality regarding its energy trading strategies in California.

bring those facts to light, and take public action based on those facts. There is no apparent restriction on the government's use of the Enron production to interrogate competitors about Enron's policies and practices, to question counterparties in Enron trades concerning their knowledge of Enron trading strategies and sharing those Enron strategies with the counterparties, to examine transactions that are now the subject of criminal investigation, or to use the documents to build a public record supporting new legislation or regulations to prevent future abuses.

In short, Enron has not established that it produced these documents under an enforceable guarantee of confidentiality from the government agencies to which it made production.[6] And in this case, the Court's orders make no provision for any confidentiality of those documents actually produced.

B. Enron Can Comply With the Court's Order. Enron tries to give the appearance that all of the information that it previously produced has not been cataloged, determined, or reviewed for privilege in an effort to explain why it wants all the documents treated as confidential. Enron tries to raise the specter that requiring it to review the documentation will substantially slow the process of its production and threaten the scheduling dates that the Court has set. Enron's claim comes a little bit late and is certainly inconsistent with the Court's understanding and Enron's actions regarding the document depository.

First, there is no question that Enron will be producing the documents. This Court's previous orders made it clear that the materials that Enron had already produced to other governmental entities and agencies would be available to the Plaintiffs by deposit into the document depository that the Court directed should be set up. That will require Enron to have at

least some basic knowledge of what it is producing. Indeed, when this Court entered its August 15, 2002, order requiring placement of such previously produced Enron materials into the document depository, it did so in face of the PSLRA's limitation on discovery and, in part, because of the Court's apparent understanding that the documents that Enron had already produced had been identified and encoded to make them ready for production to those entities.

Second, Enron joined with the Plaintiffs in the joint motion for entry of a document depository order. In that order any items placed into the document depository will receive "basic coding" in which the documents will be Bates labeled and identified as to their nature and content. This gives Enron the opportunity, if the Court decides that some limited protective order should be entered, to identify those items that would be subject to the protective order as confidential. Enron's claim that it simply cannot determine what it may have that it will produce to the Plaintiffs is inconsistent with Enron's apparent agreement with the document depository program that requires Enron to know what it gives to the Plaintiffs. Enron's request for treatment of all documents, testimony, and other materials that Enron produces as confidential is based on a false premise and unnecessary.

C. Enron's Claimed Confidential and Proprietary Information in its Trading Business. Assuming that Enron's production to the government has not waived any alleged confidentiality, the Court must still carefully review Enron's claims of confidentiality, determine if Enron has met the necessary requirements for a protective order and if, in light of the evidence showing Enron's questionable trading practices and accounting, such claims have any merit.

Enron's alleged need to keep its energy trading program confidential has to be questioned in light of the recent guilty plea by Timothy Belden, who once headed Enron's West Coast

[6] Even the production to the FERC provides Enron no comfort because the likelihood of challenge to confidentiality was always present. *See In re "Agent Orange" Product Liability Litigation*, 821 F.2d 139 (2d Cir. 1997) (no abuse

power sales. Mr. Belden has admitted to participating in a conspiracy to defraud millions of consumers in California through improper business tactics used to manipulate the California power system. *See* Timothy Belden Plea Agreement, No. CR 02-0313, *United States v. Timothy N. Belden*, in the U.S. District Court for the Northern District of California, San Francisco Division (attached as Exhibit B).

Part of the reason there is such a substantial public interest in having details concerning Enron's conduct is that former Enron executives are admitting to criminal activity in connection with those business practices. Not only does access to the Enron documents assist those who were affected by those practices to understand how they were perpetuated, but reports on such documents can serve as a general warning to others that may be tempted to engage in those practices or who may be potentially victimized by similar practices. What Enron seeks to protect are the practices and policies that some at Enron have admitted are criminal acts as well as the detailed information that allowed them to occur. Enron has no legitimate interest in protecting that information from disclosure.

D. Enron's Claims of Confidentiality With Regard to Portland General. Enron vaguely urges that some of Portland General's "negotiating position and market analyses have been produced to various government agencies." Williams Aff. at ¶ 15. Of course, Enron's production to government agencies raises questions of whether the confidentiality of that information has been preserved. Further, Enron can point to no specifics explaining how Portland General's value would have been affected by the unnamed "negotiating positions and market analyses." Finally, as the Plaintiffs' Consolidated Complaint suggests, virtually all of Enron's operations, and the reported values for those operations, are suspect.

---

of discretion to make documents available where protective order always contemplated potential for modification).

E. Enron's Claims of Contractual Requirements of Confidentiality. Enron has also suggested that the documents that it produced to the government contained information it was required to keep confidential because of agreements with third parties. But these broad, conclusory, and vague statements of unidentified contractual obligations do not meet the standards of specificity that the Fifth Circuit insists upon for a finding of good cause under Rule 26(c). *In re Terra International, supra.* Enron has not detailed any of those agreements or shown how they would apply to the materials Enron produced to the government.[7]

By producing the materials to the government with no effective protection for alleged confidential information, Enron appears to have already breached its obligations to third parties. This Court need not be in the business of bailing out Enron for any previous mistakes in its production by now entering a protective order that would shield Enron form its earlier conduct.

F. Enron's Alleged Concerns About On-Going Disputes Has Already Been Resolved. Enron has expressed concern about confidential information that might be produced here that could prove helpful to litigants in other cases. The Court has already allowed Enron to exclude from its production items privileged under the attorney-client and work product privileges. The Court has already adequately provided Enron the protection it needs for its litigation strategies in those other cases.

VIII. Concerns Raised By the Other Defendants

Other Defendants have opposed Plaintiffs' motion to the extent that it would deny any protective order to materials that those Defendants might produce in discovery once the PSLRA

[7] The Court should also consider the issue of timing in evaluating any claim of the confidential or proprietary nature of any documents or other discovery materials. Enron collapsed in October and November of 2001. The information that has been or will be produced will relate largely to events prior to that time. Prices, suppliers, business plans, and other matters within the Enron materials prior to that date (and certainly for older materials several years prior to that date) will have no relevancy or materiality in current conditions. Frequently nondisclosure agreements that companies use with one another do not extend for any longer than three or five years.

stay on discovery is lifted. Those Defendants eschew the "umbrella" protective order that Enron proposes in favor of a protective order that allows the Defendants, to producing parties, to designate certain items as confidential with a presumption that they will remain confidential until challenged by the Plaintiff. Those Defendants recommend, however, that the Court defer ruling on Plaintiff's motion as it relates to other discovery until the motions to dismiss are determined, the PSLRA discovery stay is lifted, and the Court can better determine the course of the case.

Allowing access to what Enron has already produced to the government is an easier and cleaner issue than the matters raised in the more conventional discovery anticipated when the stay is lifted. The Media Intervenors believe that it makes sense to wait until the other discovery actually begins before addressing the need for a protective order for that discovery.

IX. Conclusion

This is not the ordinary case. The Enron materials that are the only current discovery from Defendants in the case are not "the raw fruits of discovery" but a discrete set of materials produced and scrutinized by government officials looking for answers. Given the extraordinary impact of these events and the public's interest, on multiple grounds, in getting answers, the Court should provide maximum exposure to the information Enron has already produced.

For these reasons, the Media Intervenors ask this Court to grant their Motion to Intervene and to refrain from granting any protective order for any of the discovery Enron has currently been ordered to produce. The Media Intervenors also urge the Court to hold an oral hearing on this issue and request permission to appear and address the Court at such hearing.

Certainly anything prior to three years ago should not be considered of high trade secret value. In some instances the markets that Enron dealt in no longer exist.

Respectfully Submitted,

David H. Donaldson, Jr.
Attorney-in-Charge
State Bar No. 05969700
Southern District No. 4891
GEORGE & DONALDSON, L.L.P.
114 West 7th Street, Suite 1100
Austin, Texas 78701
(512) 495-1400; Fax: (512) 499-0094

COUNSEL FOR MEDIA INTERVENORS

Of Counsel:
James A. Hemphill
State Bar No. 00787674
GEORGE & DONALDSON, L.L.P.
114 West 7th Street, Suite 1100
Austin, Texas 78701
(512) 495-1400; Fax: (512) 499-0094

CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing BRIEF IN SUPPORT OF MOTION TO INTERVENE AND ON PROTECTIVE ORDER AND ACCESS ISSUES OF DOW JONES & CO., INC., THE NEW YORK TIMES CO., THE WASHINGTON POST, USA TODAY, THE HOUSTON CHRONICLE, ABC, AND THE REPORTERS' COMMITTEE FOR FREEDOM OF THE PRESS has been served by sending a copy via electronic mail to serve@esl3624.com on the 25th day of October, 2002.

David H. Donaldson, Jr.
James A. Hemphill

SUPPLEMENTAL CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing BRIEF IN SUPPORT OF MOTION TO INTERVENE AND ON PROTECTIVE ORDER AND ACCESS ISSUES OF DOW JONES & CO., INC., THE NEW YORK TIMES CO., THE WASHINGTON POST, USA TODAY, THE HOUSTON CHRONICLE, ABC, AND THE REPORTERS' COMMITTEE FOR FREEDOM OF THE PRESS has been served by via UPS on the following parties who do not accept service by electronic mail on the 25th day of October, 2002.

Thomas G. Shapiro
SHAPIRO HABER & URMY LLP
75 State Street
Boston, MA 02109
(617) 439-3939
(617) 439-0134 fax
Attorneys for Plaintiff van de Velde

Robert C. Finkel
WOLF POPPER LLP
845 Third Ave.
New York, NY 10022
(212) 759-4600
(212) 486-2093 fax
Attorneys for Plaintiff van de Velde

William Edward Matthews
GARDERE WYNNE SEWELL LLP
1000 Louisiana, Suite 3400
Houston, Texas 77002
(713) 276-5500
(713) 276-5555 fax
Attorneys for Defendants Anderson Worldwide, S.C., Roman W. McAlindan and Philip A. Randall

Amelia Toy Rudolph
SUTHERLAND ASBILL & BRENNAN LLP
999 Peachtree Street, N.E. Suite 2300
Atlanta, GA 30309
(404) 853-8000
(404) 853-8806 fax
Attorneys for Defendant Roger D. Willard

Gregory A. Markel
CADWALADER, WICKERSHAM & TAFT
100 Maiden Lane
New York, NY 10038
(212) 504-6000
(212) 504-6666 fax
Attorneys for Defendant Bank of America Corp.

Harvey G. Brown
ORGAIN BELL & TUCKER LLP
2700 Post Oak Blvd., Suite 1410
Houston, TX 77056
(713) 572-8772
(713) 572-8766 fax
Attorneys for Defendants Andersen-United Kingdom and Andersen-Brazil

Dr. Bonnee Linden, pro se
1226 W. Broadway, P.O. Box 114
Hewlett, NY 11557
(516) 295-7906

Carolyn S. Schwartz
United States Trustee, Region 2
33 Whitehall St., 21st Floor
New York, NY 10004
(212) 510-0500; Fax: (212) 668-2255

David H. Donaldson, Jr.
James A. Hemphill

The Exhibit(s) May

Be Viewed in the

Office of the Clerk